BSN Commercial Bank (M) Bhd v Zaq Construction Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D2–22–1194 OF 2000
ABDUL AZIZ J
21 MAY 2001

Civil Procedure *— Judgment — Default of defence — Judgment entered pending application for extension of time to file defence — Whether judgment regular — Application of O 42 r 8 Rules of the High Court 1980 — Failure to submit draft certificate of judgment to solicitor/registrar, effect on judgment*

The defendants had not served their defence within the period prescribed by O 18 r 2(1) of the Rules of High Court 1980 ('the RHC'), but, by the consent of the plaintiffs, the period had been extended to 5 September 2000, as allowed by O 3 r 5(3) of the RHC. On 6 September 2000, the plaintiffs intimated to the defendants that they would be entering a default judgment since the defendants had not served their defence. The defendants' request for another three weeks' extension made to the plaintiffs on the same day was turned down. The defendants did not file or serve their defence and to date they have not done so, but on 13 September the defendants filed their summons for extension of time. On that date, the plaintiffs had yet to enter judgment. They only did so on 28 September 2000, about two weeks after the summons for extension was filed and during the pendency of the application. When the parties appeared before the senior assistant registrar ('the SAR') for the hearing of the defendant's application for extension of time, the defendants having been informed of the entering of the default judgment, orally applied to the SAR for it to be set aside. The SAR set aside the default judgment and the plaintiffs appealed. The issue for the determination of the court was whether the judgment in default entered by the plaintiffs on 28 September 2000 against the defendants was regular or irregular. The plaintiffs argued that the defendants had failed to serve their defence before the expiration of the period extended by consent, and the mere filing of an application for extension of time did not operate to prevent the plaintiffs from exercising their right to enter default judgment, the period not having been extended.

Held, allowing the appeal and restoring the default judgment:

(1) The defendants had not been able to show any authority that lays down that default judgment could not be entered during the pendency of an application for extension of time to serve the defence (see p 476C).

(2) It may appear unjust to the defendants in this case to uphold the default judgment that was entered during the pendency of their application for extension of time. But that was unavoidable in the circumstances. It could not be right to say that because of those

consequences, seemingly unfair, of entering of judgment when the application for extension of time was pending, therefore the judgment was bad (see pp 476G–H, 477A).

(3) Order 42 r 8 of the RHC requires the winning party to make the first move by submitting a copy of the draft certificate of the judgment to the solicitor for the other party or, if the other party has no solicitor, to the registrar (see p 478G). The failure of the winning party to comply with the requirement of making the first move to obtain the certificate of the judgment could not have the consequence of marring the judgment itself so as to merit it being set aside. The judgment remains good. The only consequence of the winning party's failure is that he will not get the certificate of the judgment. Moreover, since no time limit is provided for the making the first move, technically it is not possible at any time to speak of failure to make the first move. Until the first move is made, it is proper to say that the first move has not yet been made, but it could not be said that there has been a failure to make it and therefore non-compliance with O 42 r 8 of the RHC. Moreover, O 42 r 8 of the RHC does not apply in the case of a judgment in default of defence entered under O 19 r 2(1) of the RHC (see pp 478I–479B).

[Bahasa Malaysia summary

Defendan-defendan tidak menyampaikan pembelaan mereka dalam tempoh yang dinyatakan dalam A 18 k 2(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), tetapi, dengan kebenaran plaintif-plaintif, tempoh tersebut telah dilanjutkan kepada 5 September 2000, seperti mana yang dibenarkan dalam A 3 k 5(3) KMT. Pada 6 September 2000, plaintif-plaintif telah membayangkan kepada defendan-defendan bahawa mereka akan memasukkan satu penghakiman ingkar memandangkan defendan-defendan tidak menyampaikan pembelaan mereka. Permintaan defendan-defendan untuk satu lagi lanjutan selama tiga minggu yang dibuat kepada plaintif-plaintif pada hari yang sama telah ditolak. Defendan-defendan tidak memfail atau menyampaikan pembelaan mereka dan sehingga kini mereka tidak berbuat demikian, tetapi pada 13 September defendan-defendan telah memfailkan saman mereka untuk lanjutan masa. Pada tarikh tersebut, plaintif belum lagi memasuki penghakiman. Mereka hanya berbuat demikian pada 28 September 2000, lebih kurang dua minggu selepas saman untuk lanjutan tersebut difailkan dan sementara menunggu permohonan tersebut. Apabila pihak-pihak tersebut hadir di hadapan penolong kanan pendaftar ('PKP tersebut') untuk perbicaraan permohonan defendan-defendan mengenai lanjutan masa tersebut, defendan-defendan setelah dimaklumkan tentang kemasukan penghakiman ingkar tersebut, secara lisan telah memohon kepada PKP tersebut untuk ia diketepikan. PKP tersebut telah mengetepikan penghakiman

ingkar tersebut dan plaintif-plaintif telah membuat rayuan. Persoalan yang perlu ditentukan oleh mahkamah adalah sama ada penghakiman ingkar yang dimasuki oleh plaintif-plaintif pada 28 September 2000 terhadap defendan-defendan adalah mengikut aturan atau di luar aturan. Plaintif-plaintif telah menghujahkan bahawa defendan-defendan telah gagal untuk menyampaikan pembelaan mereka sebelum tamat tempoh yang dilanjutkan dengan kebenaran tersebut, dan dengan semata-mata memfailkan satu permohonan untuk lanjutan masa tidak berfungsi untuk menghalang plaintif-plaintif daripada menggunakan hak mereka untuk memasuki penghakiman ingkar, bagi tempoh yang tidakpun dilanjutkan tersebut.

Diputuskan, membenarkan rayuan tersebut dan mengekalkan penghakiman ingkar tersebut:

(1) Defendan-defendan tidak dapat menunjukkan apa-apa autoriti yang menyatakan bahawa penghakiman ingkar tidak boleh dimasuki semasa menunggu satu permohonan untuk lanjutan masa bagi menyampaikan pembelaan (lihat ms 476C).

(2) Ia kelihatan seperti berlaku ketidakadilan di pihak defendan-defendan dalam kes ini untuk mengekalkan penghakiman ingkar yang dimasuki semasa menunggu permohonan mereka untuk lanjutan masa. Tetapi ia tidak dapat dielakkan dalam keadaan ini. Adalah tidak betul jika dikatakan oleh sebab akibat-akibat berikut, yang kelihatan tidak adil, iaitu memasuki penghakiman ingkar semasa permohonan untuk lanjutan masa sedang dinantikan, oleh itu penghakiman tersebut adalah salah (lihat ms 476G–H, 477A).

(3) Aturan 42 k 8 KMT menghendaki pihak yang menang untuk memulakan langkah dengan mengemukakan satu salinan draf sijil penghakiman kepada peguamcara untuk pihak yang satu lagi atau, jika pihak yang satu lagi tidak mempunyai peguamcara, kepada pendaftar (lihat ms 478G). Kegagalan pihak yang menang untuk memenuhi keperluan membuat langkah pertama untuk mendapatkan sijil penghakiman tersebut tidak mungkin mengakibatkan penghakiman tersebut rosak sehingga memeritkan ia perlu diketepikan. Penghakiman tersebut masih baik. Satu-satunya akibat daripada kegagalan pihak yang menang adalah beliau tidak akan mendapat sijil penghakiman tersebut. Tambahan pula, memandangkan tiada had masa yang diperuntukkan untuk membuat langkah pertama ini, secara teknikal ia tidak mungkin pada bila-bila masa untuk mengatakan tentang kegagalan untuk membuat langkah pertama tersebut. Sehingga langkah pertama tersebut dibuat, adalah betul untuk mengatakan bahawa langkah pertama tersebut belum dilakukan lagi, tetapi ia tidak boleh dikatakan bahawa terdapat kegagalan untuk berbuat demikian dan oleh itu berlaku ketidakpatuhan A 42 k 8 KMT. Tambahan lagi, A 42 k 8 KMT tidak terpakai

dalam kes penghakiman ingkar pembelaan yang dimasukkan di bawah A 19 k 2(1) KMT (lihat ms 478I–479B).]

Notes

For cases on judgment in default of defence, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3265–3275 and 3517–3520.

Cases referred to

Metrojaya Bhd Anor v BTC Clothier Sdn Bhd & Anor [1996] 5 MLJ 45 (refd)

Kewangan Bersatu Bhd v Yap Ah Yit & Ors [1998] 7 MLJ 442 (refd)

Legislation referred to

Rules of the High Court 1980 O 3 rr 2(1), 5(2), O 18 r 2(1), O 19 r 2(1), O 42 r 8(1), Form 79

Sharifah Shewikar Alhabshi (*Mae Taye* with her) (*Taye & Co*) for the plaintiffs.

Gregory Dicom (*Anita Mohan* with her) (*AG Dicom & Co*) for the defendants.

Abdul Aziz J:. The primary question that arises on this appeal is whether the judgment in default of defence entered by the plaintiffs on 28 September 2000 against the first, second and third defendants ('the defendants') was regular or irregular.

The defendants had not served their defence within the period prescribed by O 18 r 2(1) of the Rules of the High Court 1980 ('the RHC'), but, by consent of the plaintiffs, the period had been extended to 5 September 2000, as allowed by O 3 r 5(3) of the RHC. Next day, 6 September, the plaintiffs intimated to the defendants that they would be entering judgment since the defendants had not served their defence. The defendants' request for another three weeks' extension of time made on the same day was turned down the next day, 7 September.

The defendants did not file or serve their defence — and to date, they have not done so — but on 13 September, the defendants filed their summons for extension of time. The plaintiffs had not yet entered judgment. They did so only on 28 September, about two weeks after the summons for extension of time was filed and during the pendency of that application. It was done under O 19 r 2(1) of the RHC.

The application for extension of time must have been made by virtue of O 3 r 5(1) of the RHC. Although the application was made after the time extended by consent had expired — eight days after — that was alright, because O 3 r 5(2) of the RHC allowed it.

On 2 November 2000, when counsel for the parties appeared before the learned senior assistant registrar ('the SAR') for the hearing of the defendants' application for extension of time, the defendants' counsel,

having been informed of the entering of judgment, orally applied to the SAR for setting aside of the default judgment. Despite the objection of the plaintiffs' counsel, the SAR set aside the default judgment. From that decision, the plaintiffs now appeal. The defendants' application for extension of time has not been heard. I am told that it has been postponed to await the outcome of this appeal.

As I said, the primary question that arises on this appeal is whether the default judgment was regular or irregular, and the question arises because it was entered during the pendency of the defendants' application for extension of time. The plaintiffs' submission boils down to stating that the defendants had failed to serve their defence before the expiration of the period extended by consent, and the mere filing of an application for extension of time did not operate to prevent the plaintiffs from exercising their right to enter default judgment, the period not having been extended. The defendants' counsel has not been able to show any authority that lays down that default judgment cannot be entered during the pendency of an application for extension of time to serve the defence. *Metrojaya Bhd Anor v BTC Clothier Sdn Bhd & Anor* [1996] 5 MLJ 45, which was particularly cited by the defendants' counsel, is no such authority. I shall give my reasons later.

I have given thought to adopting, as a sound proposition, that default judgment ought not to be entered during the pendency of an application for extension of time to file the defence, and that the reason is because should the defendant succeed in getting extension of time, and duly serves his defence, there would have been no default, and the judgment will be seen as one that should not have been entered. That is the strongest reason that I have been able to think of for saying that default judgment ought not to be entered. But I do not think that is a sound proposition because if the defendant succeeded in getting the extension of time, and duly served his defence, to put matters right for the defendant, the default judgment will simply have to be set aside. Besides, it must be remembered that, on the other hand, if the defendant failed to get extension of time, the entering of default judgment would be proved to have been right.

It may appear unjust to the defendants in this case to uphold the default judgment that was entered during the pendency of their application for extension of time because, to protect themselves, they might have to apply for a stay of execution pending disposal of their application, which they might or might not succeed in getting, but if they succeeded in getting the extension of time, all the jeopardy that they had faced and the trouble they had been put to will be proved to have been unnecessary. But that is unavoidable in the circumstances, as can be seen if we supposed that the plaintiffs had done the thing that would be right beyond controversy. Supposing the plaintiffs had entered summary judgment between 6 and 13 September, that is after the expiry of the extended period, but before the defendants filed their application for extension of time, it would be beyond dispute that the plaintiffs were entitled to do so and were right in doing so. The defendants, then, on 13 September, filed their application for extension of time. To prevent execution pending disposal of their

application, the defendants would still have to apply for a stay of execution, and if they succeeded in getting extension of time, the default judgment would have to be set aside, and the jeopardy they had faced and the trouble they had been put to would likewise be proved to have been unnecessary. It cannot be right to say that because of those consequences, seemingly unfair, of entering of judgment when the application for extension of time was pending, therefore the judgment was bad, and it cannot be right because those also would be the consequences even had the entering of judgment been undoubtedly right, that is to say, had it been done before the defendants filed their application for extension of time.

I revert now to *Metrojaya*'s case. In that case, several days after the expiry of the time limited for filing the defence, the plaintiffs filed an application for judgment in default of defence. Unlike the present case where the claim is for a liquidated sum, in that case an application was necessary because the action was for, inter alia, an injunction. Several days afterwards, the defendants filed and served a defence, unlike the present case, and also an application for extension of time to file the defence. Several days afterwards, the plaintiffs filed an application to set aside the defence.

All the three applications came before Syed Ahmad Aidid J, who decided to hear the application for extension of time first because the outcome of the other two applications would depend on the outcome of that application. After hearing and considering submissions, he allowed that application and accordingly dismissed the other two applications.

It would appear that counsel for the plaintiffs had urged the learned judge to reject the reason given by the defendants for the delay in filing the defence, but the learned judge, after considering authorities, decided that he ought not to ignore the defence that had been filed, even though it had been filed out of time without leave because from it he saw the existence of a real dispute, by reason of which he decided that it would be a waste of time to shut out the defence by refusing extension of time because, if that were done and judgment in default were consequently entered, the defendants could apply to set aside the judgment in default.

As I understand the defendants' counsel in this appeal, it is because the learned judge decided to deal with the application for the extension of time before the other two applications that it was submitted that that case is an authority for the proposition that so long as there is an application for extension of time, judgment in default cannot be entered. As I see it, the decision in that case to hear the application for extension of time first was a matter of exercise of judicial wisdom, in face of the existence of the three applications. It was obviously the wisest course to dispose of that application first, as it would dispose of the other two applications. Another judge in similar circumstances might, however, in a momentary loss of foresight, have decided to deal first with the plaintiffs' application for judgment in default. Let us suppose that he then, after considering the merits of the application, decided to allow judgment in default. He would still have to hear the application for extension of time, and if, after hearing

it, he found that extension ought to be granted and he granted it, as Syed Ahmad Aidid J did, the judgment in default would have to be set aside by reason of the fact that with the extension of time, the defence having been filed, it could no longer stand as a judgment in default. That would be the unwisdom of disposing of the application for judgment in default before disposing of the application for extension of time. But that would not have been an irregularity, rendering the judgment in default a nullity and entitling the defendants to have it set aside as of right. The most that they could do was to apply for a stay of execution pending the disposal of their application for extension of time, if it was not going to be heard soon, on the ground that if it was allowed they would be entitled to have the judgment in default set aside.

That is why I do not consider that case to be an authority that supports the defendants' contention that the judgment in default in this case was irregular and was rightly set aside. I may add that in that case, the learned judge was moved to allow the extension of time because of the existence in the file of a defence which disclosed a genuine dispute, a circumstance which is absent in the present case.

I am unable to think of a sound reason for holding that the entering of default judgment in this case during the pendency of the application for extension of time rendered the judgment irregular. It was regular and it follows that it should not have been set aside on that account.

Another reason has been advanced in this appeal as meriting the setting aside of the judgment in default, and that is the failure of the plaintiffs, as 'the party in whose favour a judgment or order is given or made', to comply with the requirement of O 42 r 8(1) of the RHC that 'a copy of the draft shall be submitted for approval to the solicitor' of the defendants. In *Kewangan Bersatu Bhd v Yap Ah Yit & Ors* [1998] 7 MLJ 442, such a failure appears to be one of the reasons why the judgment in default of defence that had been entered was set aside.

The purpose of O 42 r 8 of the RHC is to provide the procedure, subsequent to the giving of a judgment (or the making of an order), for the settling of the terms of the judgment, in order to obtain an instrument that may be regarded as a formal written certificate in proof of the judgment. The procedure requires the winning party to make the first move by submitting a copy of the draft instrument to the solicitor for the other party or, if the other party has no solicitor, to the registrar. No time limit is fixed for the winning party to do so. If the winning party fails to make the first move, he will not obtain the instrument and will suffer the consequence that he will be at a disadvantage in the matter of doing or establishing something that requires the existence of the instrument. For example, if the plaintiff is the winning party, without the instrument, he may face difficulties in executing the judgment.

That being the purpose of O 42 r 8 of the RHC, in my judgment, the failure of the winning party to comply with the requirement of making the first move to obtain the certificate of the judgment cannot, in reason, have the consequence of marring the judgment itself, so as to merit its being set

aside. The judgment remains good. The only consequence of the winning party's failure is that he will not get the certificate of the judgment. Moreover, since no time limit is provided for making the first move, technically it is not possible at any time to speak of failure to make the first move. Until the first move is made, it is proper to say that the first move has not yet been made, but it cannot be said that there has been a failure to make it, and therefore a non-compliance with O 42 r 8(1) of the RHC.

I, moreover, agree with the plaintiffs' counsel that O 42 r 8 of the RHC does not apply in the case of a judgment in default of defence entered under O 19 r 2(1) of the RHC. To argue that it applies, one would first of all have to read the words 'a judgment … is given' in r 8(1) as 'a judgment in default of defence … is entered'. Now, a judgment in default of defence under O 19 r 2(1) of the RHC is entered after filing the form of judgment in form (a) of Form 79 and obtaining the registrar's signature to the form. The registrar, having signed the form, it would make no sense to insist that the procedure of O 42 r 8 of the RHC for settling the terms of the judgment be observed.

I allow the appeal and order that the default judgment be restored. The learned senior assistant registrar should proceed to hear the application for extension of time and give an early date for it. The fate of the default judgment will depend on it. The costs of this appeal shall follow the outcome of that application.

Appeal allowed.

Reported by Wong Siok Chin